Mediating NAGPRA: Bringing Cultural Consideration Back to the Table

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"Preserving Native American and Hawaiian culture is in the interest of all Americans, for these unique cultures are a part of the history and heritage of our Nation."[1]

I. INTRODUCTION

In 1986, Cheyenne leader William Tallbull discovered, and brought to the nation's attention, that the Smithsonian Institution's National Museum of Natural History collection included the skeletal remains of 18,500 Native American individuals.[2] Tallbull then approached Senator John Melcher of Montana with the issue. The resulting legislation, Senate Bill 187, was the first of 26 bills considered by Congress between 1986-1990 that attempted to resolve the issue of the repatriation of Native American skeletal remains and important cultural objects.[3] The culmination of these bills and their subsequent amendments was the National Museum of the American Indian Act (NMAIA) of 1989 and the Native American Grave Protection and Repatriation Act (NAGPRA) of 1990.

The NMAIA established the National Museum of the American Indian in Washington, D.C. and dealt with the research and repatriation of the Smithsonian Institution's collection of Native American remains. NAGPRA was meant to establish a process for repatriation and cooperation between Native American and Native Hawaiian groups that may have a claim to remains or objects and the federal institutions that currently "own" those objects.[4] NAGPRA is viewed as unique because it represents the first instance of non-Native organizations legally analyzing what is sacred from a Native perspective.[5] NAGPRA is also seen by Native Americans as a practical and a moral force drafted to correct past wrongs and to create a foundation for allowing Native American groups and non-Native institutions to negotiate on

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[1] 136 CONG. REC. H10991 (daily ed. Oct. 22, 1990) (statement of Rep. Mink).

[2] Christopher Green, Power Inequity and the Repatriation Right in the Native American Graves Protection and Repatriation Act 24 (2014) (unpublished Ph.D. dissertation, Colorado State University) (on file with the Colorado State University Libraries).

[3] C. Timothy McKeown, *Considering Repatriation Legislation as an Option: The National Museum of the American Indian Act (NMAIA) & The Native American Graves Protection and Repatriation Act (NAGPRA), in* UTIMUT: PAST HERITAGE - FUTURE PARTNERSHIPS 134, 134 (Mille Gabriel & Jens Dahl eds., 2008).

[4] *Id.* at 136.

[5] Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 76 (1992).

equal ground.[6] However, despite its diplomatic intentions, NAGPRA has not come close to resolving all disputes between Native American or Hawaiian tribes and American museums and scientific organizations.

This note examines the effectiveness of NAGPRA since its passage and suggests that the use of mediation-style processes, instead of litigation, in repatriation cases would help to form beneficial relationships and avoid costly court battles. Section II assesses the reasons for the formation of NAGPRA, the current text of NAGPRA, and the well-known case of the Kennewick Man. Section III compares Native American and Native Hawaiian methods of dispute resolution to mediation as a process. Section IV reviews the value of the NAGPRA Review Committee and presents instances in which mediation has been used to resolve repatriation claims. Section V analyzes the Melcher Bill, a predecessor of NAGPRA that did use mediation as its main form of dispute resolution and explains why even this bill did not go far enough to promote mediation in the repatriation process. Unlike litigation, mediation offers an adaptable dispute resolution process that can build relationships between opposing parties rather than engendering greater divides. Further, the consensual nature and flexibility of mediation appeals to the traditional dispute resolution mechanisms used by Native groups. Its growing acceptance in the realm of repatriation disputes should comfort museums and scientific organizations as well. When collecting institutions and Native American and Hawaiian groups work together to create a productive solution, they can help educate, preserve, and honor cultural objects of all kinds.[7] In order to better achieve these goals, NAGPRA should facilitate a mediation-like process on a case-by-case basis that enables opposing parties to reach a solution that is culturally sensitive and mutually beneficial.

II. THE FORMATION AND IMPLEMENTATION OF NAGPRA

A. *Pre-NAGPRA Treatment of Native American and Hawaiian Cultural Items*

From their first contact with European settlers, Native Americans were

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[6] Morris A. Fred, *Law and Identity: Negotiating Meaning in the Native American Graves Protection and Repatriation Act*, 6 INT'L J. CULTURAL PROP. 199, 212 (1997).

[7] *See generally* Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986) (examines the legal history of the relationship between museums and Native Americans in the context of property rights).

denied autonomy and forced into cultural assimilation.[8] This meant that, unlike other aboriginal tribes around the world, Native Americans were not allowed to develop their own independent legal system within the Anglo-American legal system. Instead, Native Americans were forced to defend themselves and their property in unfamiliar courts ruled by unfamiliar law.[9] Additionally, in the modern era, Native American tribes have often found it difficult to make their needs known to lawmakers because each tribe has different cultural values and even different languages. For instance, in 2012, there were 566 federally-recognized tribes, each treated as its own sovereign nation within the U.S. Of these, 325 live on their own reservations and, altogether, the tribes speak 169 distinct languages.[10]

Further, the common laws that govern the proper treatment of the dead in traditional cemeteries do not protect Native American dead. Instead, Native American burial sites have been exploited for artifacts and remains despite their religious belief that burial sites should not be disturbed once they are completed.[11] Because American Indian tribes had little control over their land, their burial sites were often considered public property, available for excavation and collection for permanent preservation in a public museum.[12] Prior to the enactment of NAGPRA, museums generally refused to repatriate Native American and Hawaiian cultural items on the basis that these objects should remain in museums where they can be preserved and studied.[13] The Antiquities Act of 1906 and the Archaeological Resources Protection Act of 1979 buttressed the position of the museums by defining archaeological resources found on public land as property of the United States and requiring

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[8] Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY U. L. REV. 13, 16 (1998).

[9] *Id.*

[10] Green, *supra* note 2, at 12. Additionally, many tribes have their own courts to handle civil and criminal matters that take place in the reservations. However, these courts do not have jurisdiction over NAGPRA claims.

[11] Often this occurred because of a fundamental difference between Native beliefs and those of Anglo-Americans. For example, in 1965 a boy discovered a Seminole grave in the Everglades. He photographed the gravesite and removed the skull, later arguing in court that he thought the grave was abandoned. His conviction by the lower court of malicious removal of the skull was overturned by an appeals court that held that there was no malicious intent. The Florida courts, and the boy, clearly did not understand or respect Seminole burial methods and therefore the boy was not punished for something that would be very disturbing if it had occurred in a traditional cemetery. Echo-Hawk, *supra* note 7, at 446-47.

[12] S. REP. NO. 100-601, at 3 (1988).

[13] *Id.* at 2.

these items to be stored in a permanent museum collection.[14]

The result of these practices is demonstrated by a poll conducted by the American Museum Association (AMA) in 1988, which reported that half of the AMA membership (those that answered the poll) held 48,000 specimens of Native American human remains within their collections.[15] Additionally, the National Park Service reported owning an uncatalogued collection of 15.5 million Native American cultural objects.[16] Further, the Smithsonian's Collection of 18,500 American Indian skeletal remains were partially acquired from the Army Medical Museum, which had obtained the remains as part of a nineteenth-century anthropological study. The point of the study, started in 1896 by the Surgeon General, was to determine accurate average measurements of "adult crania of the principal Indian tribes."[17]

B. *NAGPRA, the Law*

Congress enacted NAGPRA to correct these gross inequalities between the protection of Native and non-Native cultural objects. NAGPRA requires museums and other collecting institutions to make a complete inventory of any Native American human skeletal remains, funerary objects, sacred objects, and items of cultural patrimony in their possession.[18] In addition, NAGPRA established a Review Committee whose purpose is to monitor the inventory and identification of cultural items as well as to supervise and review

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[14] *Id.* at 2-3.

[15] *Id.* at 3.

[16] *Id.*

[17] *Id.* at 4. The study of phrenology was quite popular at the turn of the 19th century. Anthropologist Samuel Morton, known as the father of the American school of ethnography, began collecting Native human remains, especially skulls, in the mid-19th century to study for phrenology purposes. Green, *supra* note 2, at 15. These skulls were occasionally obtained legally, but Morton built his collection largely by stealing and grave robbing. Skulls from all races were collected but white, Christian remains were protected by strict laws and regulations inspired by English Common Law. Further, while Native American remains were to be studied when found, white remains were quickly reinterred. *Id.* at 17. His findings reinforced the general opinion of Anglo-Saxon Americans that Native Americans were inferior and did not deserve rights over their own lands, much less their cultural and skeletal remains. In fact, it was thought that, "the general size [of Native heads] is greatly inferior to that of the average European head; indicating inferiority in natural mental power." *Id.* at 15 (quoting Jack F. Trope, *The Case for NAGPRA, in* ACCOMPLISHING NAGPRA 19 (Sangita Chari & Jaime M. N., Lavallee eds., 2013)). At the extreme, phrenologists of the time believed that both Native Americans and African-Americans were naturally meant to be enslaved or culled. *Id.* at 15.

[18] Native American Graves Protection and Repatriation Act, 25 U.S.C.S. § 3003 (2016).

repatriation efforts.[19] In order to request repatriation, a possible claimant must prove that they are a "lineal descendent of a deceased Native American, a culturally affiliated Indian tribe, a culturally affiliated Native Hawaiian organization, or a tribe or organization that can show ownership or control of an item."[20] NAGPRA operates on a preponderance-of-evidence standard when determining cultural affiliation and considers, though not equally, a wide variety of information such as geographic location, biological and anthropological data, linguistic and folkloric tradition, and historical knowledge.[21]

If there is a dispute within the repatriation process, Sec. 3006(c)(4) allows the Committee to "facilitat[e] the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of [cultural] items including convening the parties to the dispute if deemed desirable."[22] This is the only time that dispute resolution is referred to in the text of NAGPRA as it applies to the repatriation process. Sec. 3006(c)(4) does not specify how disputes are meant to be resolved, but simply gives the Review Committee the power to help facilitate resolution.[23] Since its creation, the Review Committee has only had a handful of chances to attempt to resolve repatriation disputes. However, even in those occasions, resolutions do not come easily or quickly and often lead to significant litigation in a court of law.

Additionally, litigation can arise as a result of the failure of a museum or organization to properly notify Native groups who may have claims to inventoried objects.[24] Once an inventory is complete, the collecting institution

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[19] *Id.* at § 3006. The Review Committee consists of seven members appointed by the Secretary of the Interior: three representing Native American and Native Hawaiian organizations, three representing museums and scientific organizations, and one person chosen from a list of possible members and approved by all other members.

[20] James A.R. Nafziger & Rebecca J. Dobkins, *The Native American Graves Protection and Repatriation Act in Its First Decade*, 8 INT'L J. CULTURAL PROP. 77, 78 (1999).

[21] *Id.* at 86.

[22] Native American Graves Protection and Repatriation Act, 25 U.S.C.S. § 3006(c)(4).

[23] The Code of Federal Regulations does list some more specific examples of what the Review Committee can do regarding dispute resolution. Section 10.17(b) of the Code states that the Review Committee may, "facilitate the informal resolution of disputes relating to these regulations among interested parties that are not resolved by good faith negotiations. Review Committee actions may include convening meetings between parties to disputes, making advisory findings as to contested facts, and making recommendations to the disputing parties or to the Secretary as to the proper resolution of disputes consistent with these regulations and the Act." 43 C.F.R. §10.17 (2016).

[24] Fred, *supra* note 6, at 204.

then has six months to notify appropriate Native American or Hawaiian groups who may have a claim to these objects. This notification should be in person and through publication in the Federal Register. [25] In establishing the provenance of unknown artifacts, museums or collecting institutions normally rely solely on scientific techniques. [26] Therefore, tribes with cultural knowledge who are not identified based on the scientific methods may not be invited to participate in the repatriation process at all. If such a tribe sees an object on the Federal Register and wants to make a claim to it, they have to make a formal counter-claim or possibly even sue in order to make their argument.[27] Due to a lack of resources, many tribes are not able to pursue legal action and therefore do not benefit from NAGPRA at all.[28] Further, tribes that are not federally recognized technically have no rights under NAGPRA and therefore are excluded from the repatriation process altogether.[29]

Despite NAGPRA and the Review Committee's attempts to help resolve disputes, the imbalance of power between Native American and Hawaiian groups and collecting institutions has allowed litigation to become the norm for repatriation disputes. To counteract this, culturally appropriate forms of mediation should be added into the Review Committee's arsenal of dispute resolution techniques. If this were the case, Native groups, unable to afford litigation, would still have a chance to bring repatriation claims without depleting all of their resources.

A mediation process that is unique to each dispute would also bring the opposing parties together, encouraging them to open lines of communications in the interest of reducing future disputes and increasing cultural sensitivity. One of the biggest challenges to NAGPRA to date, and a case that would have benefited from the cultural inclusivity offered by directed mediation, came in the form of a 9,000-year-old man. The Kennewick Man case demonstrates how a lack of cultural awareness in the repatriation process can result in litigation and broken relationships.

C. *The Case of the Kennewick Man*

The case of the Kennewick Man is likely the most well-known U.S. repatriation case and was ultimately decided by the 9th Circuit Court in 2004.[30] The remains of a prehistoric man, later dubbed the Kennewick Man, were

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[25] Native American Graves Protection and Repatriation Act, 25 U.S.C.S. § 3003(d).
[26] Fred, *supra* note 6, at 204.
[27] Green, *supra* note 2, at 47.
[28] *Id.* at 49.
[29] Fred, *supra* note 6, at 207.
[30] Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004).

discovered accidentally by two teenagers in July 1996 near Kennewick, Washington on land owned by the U.S. Army Corps of Engineers (COE). The remains were initially sent to forensic anthropologists who determined that the Kennewick Man was about 9,000 years old and was unrelated to any present day American population.[31] This resulted in a drawn-out debate between local Native American tribes and scientists as to what should become of the remains.[32] Scientists pushed for forensic study, while local Native American tribes claimed the remains and called for immediate reburial under the auspices of NAGPRA.[33]

A long legal battle followed in which scientists claimed that the Kennewick Man's remains presented an "irreplaceable source of information about early New World populations that warrants careful scientific inquiry to advance knowledge of distant times."[34] In contrast, the Native American tribes categorized the remains as "that of an ancestor, who according to the tribes' religious and social traditions, should be buried immediately without further testing."[35]

The district court ruled for the scientists, holding that NAGPRA did not apply and therefore, the scientists could continue their studies under the Archaeological Resources Protection Act (ARPA).[36] The 9th Circuit Court of Appeals affirmed the ruling and decided that, in order for NAGPRA to apply, the human remains must be determined to have some relationship with a presently existing Native American or Native Hawaiian tribe.[37] The Native American tribal defendants chose not to appeal their case to the Supreme Court due to a lack of financial resources and the risk of an unfavorable final decision.[38] Instead, these groups continue to lobby for NAGPRA to be strengthened so that it reflects Congress' original intention of protecting tribal burials and repatriating sacred objects.[39]

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[31] Ryan M. Seidemann, *Time for a Change? The Kennewick Man Case and its Implications for the Future of the Native American Graves Protection and Repatriation Act*, 106 W. VA. L. REV. 149, 154 (2003).

[32] DOUGLAS REID WEIMER, CONG. RESEARCH SERV., RL33031, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA): LEGAL AND LEGISLATIVE DEVELOPMENTS 8 (2005).

[33] Seidemann, *supra* note 31, at 155.

[34] *Bonnichsen*, 357 F.3d at 869.

[35] *Id.*

[36] *Id.* at 871-872.

[37] *Id.* at 879.

[38] WEIMER, *supra* note 32, at 12.

[39] *Id.* There have been proposed changes to the definition of "Native American" brought through Congress. In 2004, Senator Campbell introduced S. 2843, which would have added "was" to the definition, therefore allowing it to extend to pre-existing tribes.

The case of the Kennewick Man reveals how different the priorities of Native peoples and collecting institutions can be. Scientists, and in this case also legal authorities, looked for concrete evidence of a connection between the DNA of the human remains and a modern tribe.[40] The Native peoples, on the other hand, believe that their ancestors have lived in a certain geographic area since the beginning of time.[41] Further, the oral tradition of the Native tribes does not recognize the separation between modern and ancient peoples.[42] Rather than allowing the courts to decide controversial issues like those in the Kennewick Man case, a situation in which Native American and Native Hawaiian tribal representatives are at a disadvantage, mediation could provide a less contentious alternative.

Creative solutions are plentiful for repatriation cases. In this case, the scientists could have agreed to specific tests and supervision from the Native American groups, after which the remains would have been interred. The Native American representatives could have allowed the scientists to make molds of the bones before they were returned. Or, the scientists and Native Americans could have come to an agreement on the best way to display the remains so that they could be used for educational purposes that also respected Native traditions.

Mediation may not resolve every dispute and is not without its own drawbacks, but in a case like the Kennewick Man, cultural understanding and facilitated negotiation could have done much to help resolve this dispute. Where the two parties have such fundamental differences, a court setting will only push them farther apart.

Senator McCain introduced the Native American Omnibus Act of 2005, which also proposed an amended definition of "Native American." *Id.* at 13. This definition would read: "'Native American' means of, or relating to, a tribe, people, or culture that is or was indigenous to any geographic area that is now located within the boundaries of the United States." *Id.* Neither bill made it into the House from the Senate although both were reported on favorably by the Senate Committee on Indian Affairs.

[40] Seidemann, *supra* note 31, at 162. *But see* Michael Coffey, *Corps Determines Kennewick Man is Native American*, (Apr. 27, 2016), http://www.nwd.usace.army.mil/Media/News-Releases/Article/742935/corps-determines-kennewick-man-is-native-american/. *See also* Morten Rasmussen, et al., *The Ancestry and Affiliations of Kennewick Man*, 523 NATURE 455 (2015) (Reporting that "the Kennewick Man's DNA sequence sample is genetically closer to modern Native Americans than to any other population worldwide." Therefore, the NAGPRA repatriation process will begin anew and Native Tribes can now submit a claim to recover the controversial remains.).

[41] Seidemann, *supra* note 31, at 162.

[42] *Id.*

III. CROSS-CULTURAL METHODS OF DISPUTE RESOLUTION

As demonstrated by the Kennewick Man case's failure to find a middle ground, any attempt at repatriation dispute resolution must be done with cultural sensitivity in order to be successful. Mediation is one method that can bridge cultures provided both sides are aware of their fundamental differences. In order to better understand these differences, Neill H. Alford, Jr. analogized Native American societies to "apple societies" and Anglo-American societies—largely represented by collecting and scientific institutions in this article—to "orange societies".[43] Native American "apple" societies view the world holistically, with all things operating interdependently. Conversely, "orange" societies specifically stemming from English or European traditions place law, religion, art, and economics into their own boxes and generally try not to let them overlap.[44] Where "apple" societies see all things as coequal and balanced, "orange" societies create a hierarchy of all things and categorize them as either living or dead.[45] Additionally, Native American objects are often defined by their context rather than by a singular use.[46] Further, where the Anglo-American may see power as a secular force based mostly on economics, the Native American attributes power to a great connection with spirituality and religion.[47]

Another important concept to understand is that the Anglo-American definitions of art and sacred objects do not apply to the Native American society. In fact, many sacred Native American items that are used in ritual are not viewed as metaphorically possessing spiritual power. Rather, the item *is* the spiritual entity.[48] For example, when used in a tribal dance, the raven rattle of the Kwakiutl does not represent a raven but is, in fact, a raven. The rattle is even carried upside down during the ceremony to prevent it from taking flight.[49] In the same manner, tribal masks not only allow the wearer to

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[43] Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 181 (1992).

[44] *Id.*

[45] This can be seen in the Kennewick Man case where the scientists sought a very specific scientific connection between the modern Native American tribe and the Kennewick man and the Native American tribes considered their connection to the remains to be spiritual.

[46] Strickland, *supra* note 43, at 182.

[47] *Id.* at 184.

[48] *Id.* at 186.

[49] *Id.* at 185.

transform into the entity represented by the mask, but they also contain such power that they require feeding and grooming in between uses.[50]

Based on these cultural differences, it is not surprising that traditional English legal practices like court litigation were initially foreign to Native American tribes. Methods of alternative dispute resolution entered Indian Law through the reservations in the 1970s as an alternative to costly litigation.[51] Promoted by Chief Justice Warren Burger, the ADR movement in reservations paralleled its rise in popularity in the federal court system.[52] There were dual causes for the increase in ADR on reservations including the need for the federal courts to reduce their caseload and the search for more traditional forms of decision-making by the Native American claimants.[53] Supporters of ADR propose that, as opposed to adversarial processes like litigation, "mediation promotes internal community cohesion, cultural pride, and tribal sovereignty."[54]

These very attributes hearken to more traditional Native American and Native Hawaiian peacemaking processes, making mediation a more comfortable forum for Native groups than a courtroom. However, because each Native group has individual traditions and practices, the form that the mediation should take should be decided on a case-by-case basis. Mediators must also be educated about the traditional peacemaking processes of the parties and be able to communicate these practices to the opposing party. A few peacemaking techniques used by Native groups are summarized below.

A. *Native American Methods of Dispute Resolution*

The Native American traditional peacemaking process is based on conciliation and building relationships rather than strictly agreement.[55] Within the idea of peacemaking relationships, several themes emerge, including the involvement of "elders, families, community/individual healing, and spirituality in the context of culture."[56] In a study of the Salish Tribes of the Pacific Northwest it was found that elders often taught by example and were looked to for solutions and wisdom when problems in the community arose.[57]

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[50] *Id.* at 189.

[51] Nader & Ou, *supra* note 8, at 25.

[52] *Id.* at 28.

[53] *Id.* at 27.

[54] *Id.* at 24.

[55] RICHARD PRICE & CYNTHIA DUNNIGAN, TOWARDS AN UNDERSTANDING OF ABORIGINAL PEACEMAKING 3 (1995).

[56] *Id.* at 17.

[57] *Id.* at 19.

If there was a dispute between multiple families, the elders would convene and negotiate an acceptable solution. Transgressions were treated with a cold shoulder from the community until the offending family changed their ways.[58] The American Indian peacemaking approach is similar to mediation and has a "horizontal" scope such that the process works to address the root of the problem rather than just the problem at hand.[59]

Another example of conciliation-based dispute resolution can be found in the Navajo Nation, which has two court systems.[60] The first is formal and resembles the Anglo-American model of litigation. The second is a traditional peacemaker system which "relies on equality, the preservation of continuing relationships, or the adjustment of disparate bargaining positions between parties."[61] The peacemaking court begins with a prayer and the discussion starts with each side telling its story of the dispute. The peacemaker, usually an elder nominated for the position due to their spirituality and good works, discusses the Navajo laws and values that have been violated and suggests possible remedies. [62] The parties are in constant discussion with the peacemaker until a consensus is reached. Because the peacemaker is such a respected position in the Navajo community, their word is treated as law.[63] The main objective of this peacemaking court is to retain harmony by retaining good relationships within the community.[64] This method of dispute resolution ensures that community peace is restored while also equalizing any power discrepancies between the parties.

When undertaking third-party mediation, there are clear differences between what Native American Tribes and Anglo-Americans want in a mediator. While the latter emphasizes neutrality and independence of the mediator, the former prefers mediators that understand their cultural practices and beliefs. However, both parties want a mediator that is honest, has integrity, and can be a creative problem-solver.[65] In order to create better negotiations with American Indian groups, a semblance of partnership must be created and Native rituals must be acknowledged. For example, the Aboriginal attendees of the Canadian First Ministers' conferences on Aboriginal and treaty rights

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[58] *Id.* at 19-20.

[59] Donna S. Salcedo, *Hawaiian Land Disputes: How the Uncertainty of the Native Hawaiian Indigenous Tribal Status Exacerbates the Need for Mediation*, 14 CARDOZO J. CONFLICT RESOL. 557, 579 (2013).

[60] PRICE & DUNNIGAN, *supra* note 55, at 28.

[61] *Id.*

[62] *Id.* at 29.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 31-32.

in the 1980s held pipe-smoking and prayer ceremonies throughout the course of the conference.[66]

The idea of reciprocity, which is appreciated by most cultures, can also be useful in a mediation situation in order to strengthen the bonds between parties.[67] One of the problems with Anglo-American litigation is that it is often win-lose, whereas alternative methods may result in a win-win situation that could build relationships further. Fairness and reciprocity are also emphasized more in a problem-solving context than a competitive context.[68]

B. *Native Hawaiian Methods of Dispute Resolution*

The principles of NAGPRA are generally less effective in Hawaii because Native Hawaiians are not organized into tribes, like American Indians are, making the finding of a proper claimant very difficult.[69] Because of this, more claimants tend to come forward in repatriation claims, delaying the process. In fact, no one ethnic group represents the majority of the population.[70] This also means that Native Hawaiians have no organized judicial body to serve this role in addressing NAGPRA claims.[71] Further, the traditional forms of dispute resolution used in Hawaii are consensual—these include negotiation, mediation, community boards, conciliation commissions, *ho'oponopono*[72], and talking circles.[73] The threat of litigation is discouraging for individual organizations seeking to regain the bones of their ancestors or their sacred objects under NAGPA regulations.

The case of *Na Iwi O Na Kupuna O Mōkapu v. Dalton* is representative of NAGPRA litigation in Hawaii.[74] Between 1915 and 1975, over 1500 sets of human remains and 281 cultural items were excavated from Mōkapu Peninsula by the United States Marine Corps and the Bishop Museum as a result of the expansion of the Kane'ohe Marine Corps Air Station.[75]

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[66] *Id.* at 35.

[67] *Id.* at 36.

[68] *Id.*

[69] Matthew J. Petrich, *Litigating NAGPRA in Hawai'i: Dignity or Debacle?*, 22 U. HAW. L. REV. 545, 560 (2000).

[70] Bruce E. Barnes, *Conflict Resolution Across Cultures: A Hawaii Perspective and a Pacific Mediation Model*, 12 MEDIATION Q. 117, 120 (1994).

[71] Petrich, *supra* note 69, at 553.

[72] *Id.* at 566 (*ho'oponopono* is a twelve step dispute resolution process that allows parties to come together within Native Hawaiian society and resolve their differences in a mutually beneficial manner, with no winners or losers).

[73] Barnes, *supra* note 70, at 119.

[74] Na Iwi O Na Kupuna O Mōkapu v. Dalton, 894 F. Supp. 1397 (D. Haw. 1995).

[75] Petrich, *supra* note 69, at 555.

Unfortunately, mishandling of the bones resulted in several instances of missing bones and the "commingling of the bones of different individuals."[76] Repatriation negotiations began before the passage of NAGPRA, but were unsuccessful.

The Native Hawaiians, through the non-profit group of Hui Mālama[77], formally requested inventory, repatriation, and reinternment of the remains in 1990 once NAGPRA was passed.[78] After several requests, the Navy (who took over for the Marines who had excavated the remains) and the Bishop Museum published their inventory in 1994. However, Hui Mālama was enraged at the continued handling and study of the bones, which the Navy and the Museum argued was necessary to establish ethnicity.[79] Due to the repeated delays, Hui Mālama filed a suit for declaratory and injunctive relief in June 1994.[80] The judge ruled for summary judgment against Hui Mālama and declared that the bones were properly inventoried.[81] The result of the *Na Iwi O Na Kupuna O Mōkapu v. Dalton* case was clearly unsatisfying for the Native Hawaiians. NAGPRA did force the museum to inventory the bones, but it did not prevent the mishandling of said bones or lessen the animosity felt between the museum and the Native peoples.

In order to resolve the obstacles that Native Hawaiian groups encounter in litigation, a model of cross-cultural conflict resolution specific to Hawaii has been proposed: the Pacific model.[82] This model utilizes cultural go-betweens, or persons who are bilingual and bicultural, to serve as ambassadors of a sort to the process of mediation.[83] When a dispute arises, the parties will identify cultural resolution methods that may be appropriate to solving the problem and notify their cultural peacemakers (priests, mediators, hakus, etc.) of the

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[76] *Id.* at 556.

[77] *Id.* (Hui Mālama, an abbreviation of Hui Mālama I Na Kupuna O Hawai'i Nei, is mentioned in NAGPRA as having the express ability to bring litigation under the statute).

[78] *Id.*

[79] *Id.* at 557.

[80] *Id.* at 558.

[81] *Id.* ("Judge Ezra held specifically that: (1) Human remains do not have standing to sue under NAGPRA; (2) Human remains are not recognized as legal persons and do not have interests that can be legally protected; (3) Despite being specifically named in NAGPRA, Hui Mālama is not the sole guardian of all Native Hawaiian remains; (4) Hui Mālama has standing to sue under NAGPRA; (5) NAGPRA does not establish a fiduciary obligation by the Federal Government; (6) The inventory report created under NAGPRA is an agency record for purposes of Freedom of Information Act ("FOIA"); and (7) The inventory report produced pursuant to NAGPRA must be released under FOIA.") (citing generally Na Iwi O Na Kupuna O Mōkapu v. Dalton, 894 F. Supp. 1397 (D. Haw. 1995)).

[82] Barnes, *supra* note 70, at 125.

[83] *Id.* at 126.

issue. The go-betweens will help the peacemakers on both sides understand the opposing culture in order to come to a solution.[84] This is an expansion on the concept of co-mediation and is meant to utilize cultural expertise wherever possible.[85]

Both Native American and Native Hawaiian groups are at a disadvantage when facing NAGPRA litigation. However, there are many similarities between Native processes such as *ho'oponopono* or talking circles and mediation. Therefore, NAGPRA, instead of encouraging adversarial processes, should facilitate individual mediation sessions that are tailored to the parties and the dispute at hand. These processes, because they are familiar to the Native group and the collecting institution, will lead to better, more enforceable, decisions. The flexibility of mediation will also allow for more creative solutions to repatriation issues.

IV. MEDIATION AND REPATRIATION

It is clear that Native American and Native Hawaiian people use processes much more like mediation than litigation within their own communities. Additionally, mediation can be the best option for indigenous tribes because the process often preserves lasting relationships between the tribe and the other party.[86] This is especially useful in the case of Native peoples because the tribe seeking repatriation often will have to, and may in fact want to, deal with the opposing party again.[87] For example, an American Indian tribe seeking human remains from a University museum may want to build a relationship with the University to ensure that they can protect other objects in the University's collection. Or, the University may want to establish a better relationship with the tribal community to foster further research.

However, the introduction of mediation or a similar process to repatriation claims must be done intentionally and with cultural sensitivity. Simply educating an existing mediator about cultural issues is not always effective. In fact, the Program on Conflict Resolution found that those of Asian descent in Hawaii often will choose to work through family and community connections

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[84] *Id.* at 126-27.

[85] *Id.* at 128.

[86] Salcedo, *supra* note 59, at 576.

[87] Also consider that Native American parties do come to the negotiation table with some power because of the litigation and Congressional statutes that have come into being in the past few decades. PRICE & DUNNIGAN, *supra* note 55, at 37 (large museums and research institutions, under NAGPRA, now have an incentive to learn to negotiate with Native American and Hawaiian groups).

rather than go to the police or government officials if a problem arises.[88] Due to the great variety of cultures found in Hawaii, and the wider United States, no one mediator, even if they were sensitive to every culture, is the ideal mediator for all cultural conflicts. This means that the search for an appropriate mediator may be long. In order to resolve this, NAGPRA should establish, along with a procedure for mediation, a list of known mediators and their cultural familiarity with different groups.

Adopting a traditional mode of dispute resolution, such as a talking circle or a medicine wheel, also needs to be done with cultural sensitivity.[89] Just because the medicine wheel method may have been used by a certain group traditionally, that does not mean that the modern group will want to use that method. Additionally, if the Native group does suggest the use of such an alternative method, non-Native participants need to be extensively briefed on the cultural importance and process of that method.[90]

Every dispute over a cultural object or set of human remains will be unique based on the beliefs of the claimants, the history of the object, the parties involved, and other applicable laws. Therefore, it only makes sense to facilitate resolution in a different way for every dispute. Perhaps a Native Hawaiian claimant would prefer to participate in a process similar to *ho'oponopono* rather than traditional mediation in a conference room. Because family members that traditionally participate in *ho'oponopono* are expected to cooperate, a similar approach towards repatriation could reduce litigation over Native Hawaiian objects and increase the likelihood of enforcement, at least on the side of Native peoples. In order to facilitate a mediation in the *ho'oponopono* style, both Hawaiian elders and traditionally trained mediators who could help all participants to understand the process would need to be involved. Without an inclusive and flexible process such as this, the NAGPRA Review Committee has not been as effective as it could be.

A. *Actions of the NAGPRA Review Committee*

Of the five disputes submitted to the review committee in its first decade of existence, two were resolved by the committee, one is still being decided, and two were sent to court.[91] Of the two that were sent to court, it is noteworthy

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[88] Barnes, *supra* note 70, at 122.

[89] *Id.* at 123.

[90] *Id.* at 124.

[91] Nafziger & Dobkins, *supra* note 20, at 94-96. In the first case, a Native Hawaiian organization requested the return of two sets of unidentified remains from the Phoebe Hearst Museum. The committee reviewed osteological, contextual, and spiritual evidence to determine that one set of the remains should be repatriated and the other should be

that one was later resolved through court-ordered mediation. Of course, five cases make quite a small sample size. However, communication between the opposing parties and the Review Committee did help to resolve at least one of these cases, indicating that mediation should be considered as a viable alternative to litigation.

Naturally, the Review Committee only sees repatriation claims when there is a dispute. But there are examples of voluntary settlement between Native groups and collecting institutions. For example, the Field Museum of Chicago and the Pawnee tribe came to an agreement concerning two medicine bundles in the museum's collection.[92] The museum's legal counsel acknowledged that they had no valid claim to title over the bundles but the Pawnees agreed to let the museum keep the bundles conditionally. The Field Museum must adhere to standards set by the Pawnee tribe, and Pawnee consent must be given before the bundles may be accessed.[93] This type of resolution was aided by the fact that the Pawnee and the Field Museum have a longstanding relationship.

Where a voluntary settlement cannot be reached, mediation should be the preferred first step towards resolution. The cases solved by negotiation and mediation in the first ten years of the Review Committee show that mediation

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transferred to a museum in Hawaii for further analysis. These terms were accepted by both parties and eventually both sets of remains were reburied. *Id.* at 94. Second, fifteen Native Hawaiian groups submitted claims for 1,500 sets of human remains from a U.S. naval air station in Oahu. The Committee recommended that the Marine Corps, who had ownership of the land, hold onto the remains. A federal court now has jurisdiction over the case. *Id.* at 95.

The third case reviewed by the Committee concerned two Oneida tribes, New York and Wisconsin, who both submitted claims for a wampum belt in the Chicago Field Museum. The wampum belt fit squarely into NAGPRA guidelines of an object of cultural patrimony. However, the New York Oneida do not recognize the Wisconsin Oneida as a valid tribe or their claim to the wampum belt as a valid claim despite the fact that the Wisconsin Oneida have documentation to show that the museum bought the belt from the grandson of one of their former chiefs. Fred, *supra* note 6, at 206. Both groups seem to expect the museum to decide who has the proper claim and much time has been expended on this debacle. *Id.* at 207. The Committee recommended further discussion. Nafziger & Dobkins, *supra* note 20, at 94.

The claimant in the fourth case heard by the Review Committee withdrew her claim once the Hearst Museum submitted documentation that likely established their right of possession to a disputed Kiowa shield. *Id.* Finally, the fifth case heard by the Committee concerned a carved wooden figure owned by the Museum of Natural History in Rhode Island. The Committee found that the museum did not have right of possession and recommended repatriation. The museum refused and the case was sent to the federal courts. The two parties agreed to mediation and eventually came to a solution that resulted in the return of the figure and a donation to the museum. *Id.* at 95, 97.

[92] Fred, *supra* note 6, at 207.

[93] *Id.*

is effective in the repatriation context. Further, mediation can be successful even when a dispute has progressed to litigation, as seen in the case concerning the Rhode Island Natural History Museum (summarized in footnote 91). Mediation has, in fact, proven to be a successful method for resolving repatriation disputes both domestically and internationally. Both domestically and internationally, mediation allows for creative solutions that can create binding agreements. An important part of every successful scenario is the presence of culturally sensitive mediators who can properly assess the needs of both parties. NAGPRA should follow this example and utilize mediation where it has proven to be successful to increase the efficacy of the Review Committee as well as the satisfaction of the parties involved in NAGPRA claims.

B. *The Native American Heritage Commission*

Between 1990-1991, the Native American Heritage Commission (NAHC) and the Community Relations Service (CRS) of the U.S. Department of Justice conducted five mediations on the repatriation of Native American remains, four of which led to enforceable solutions.[94] Four were between tribes and developers and one was between a tribe and two universities.[95] Because the NAHC and CRS work together, they can combine their expertise to create a culturally sensitive team. In fact, the NAHC mediator is Pomo Indian while the CRS mediator is Chinese American.[96]

The mediators sift through birth certificates, tribal certifications, and NAHC documents to identify the proper claimants of remains found on construction sites or in universities.[97] The mediators then work extensively with both parties separately to ensure that they have realistic expectations and demands. Often the chosen Native American representatives are selected

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[94] Stephen N. Thom, Larry Meyers, & Julian Klugman, *Mediation and Native American Repatriation of Human Remains*, 10 MEDIATION Q. 397, 397 (1993). Sections 7050.5 and 5097.94 of the California Health and Safety Code and Public Resources Code, respectively, makes it illegal to knowingly disturb human remains and established the NAHC to resolve disputes relating to Native American burials. *Id.* at 398. The CRS was established under Title X of the 1964 U.S. Civil Rights Act and has the purpose of mediating "community-wide racial disputes." *Id.* at 398-99.

[95] *Id.* at 397.

[96] *Id.* at 400.

[97] *Id.* Mediations between tribes and developers are often anticipated even before remains are found. Tribes will take a stand against developers if they have some knowledge, through oral traditions or otherwise, that there are remains in the area. This makes it easy to begin mediation because the parties, and the CRS, are involved from the very beginning. *Id.* at 399.

because they communicate well with both the tribal elders and the mediators.[98] The mediator's role is to "outline the issues, facilitate the exchange of perspectives on the issues, clarif[y] misunderstandings, and then listen for potential solutions."[99]

The NAHC should serve as an example for NAGPRA to follow moving forward. While choosing a mediator may be difficult in some cases, it is clear that the effectiveness of the NAHC is partially due to the work of culturally sensitive mediators. Additionally, allowing each side to choose representatives (that are not necessarily lawyers) gives both groups a personal voice. This simple form of empowerment engenders trust in the process and is more likely to lead to enforceable decisions.

C. *International Restitution of Cultural Property*

Alternative dispute resolution techniques have also become more popular in the area of international restitution of art and cultural property in the past several decades; there are several models that NAGPRA could implement in the future. The Washington Declaration of 1998, for example, charged all concerned nations to develop their own processes, especially as they relate to ADR, for handling Nazi-era looting claims.[100] ADR, and particularly mediation, provides a wealth of potential solutions that may be mutually beneficial. For example, potential outcomes could be conditional restitution, permanent or long-term loans, joint ownership, financial compensation, or even the production of replicas.[101]

International organizations such as UNESCO support utilizing various ADR methods for resolving cultural property disputes. The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation was created by UNESCO in 1978 to help resolve issues of restitution and encourage the return of cultural property illegally taken from its origin country.[102]

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[98] *Id.* at 401.

[99] *Id.* at 403.

[100] Marie Cornu & Marc-André Renold, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Settlement*, 17 INT'L J. CULTURAL PROP. 1, 24 n.13 (2010).

[101] *Id.* at 19-23.

[102] United Nations Educational, Scientific and Cultural Organization [UNESCO], *Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation*, UNESCO Doc. CLT/CH/INS-2005/21 (Oct. 2005).

The Committee passed their Draft Rules for mediation and conciliation of cultural property disputes at their sixteenth session in 2010.[103] The Draft Rules allow each member state (of which there are twenty-two) to choose two mediators to be added to a list of proposed mediators or conciliators. Both parties must agree to the mediator[104] as well as the process of mediation in general. The mediators are allowed to do their own outside research about each particular case and can also request experts and witnesses to give opinions on specific issues.[105] Every mediation is confidential and any party may choose to leave if the process is too drawn-out or unfavorable.[106] The mediation is not binding, but the parties may choose to create a binding agreement out of their resolution if it is favorable.[107]

The two examples of the NAHC and the Intergovernmental Committee demonstrate that repatriation cases can be successfully resolved through mediation. In fact, adversarial processes are no longer considered the best way to resolve issues of repatriation and, therefore, NAGPRA needs to be updated to reflect that stance. Both the NAHC and the Intergovernmental Committee embrace the cultural and practical concerns of the opposing parties and work with them to create a mutually satisfactory agreement. Most importantly, the process of mediation can be individualized based on the needs of the parties. This type of procedure empowers both parties while also encouraging them to work towards an agreement.

V. THE MELCHER BILL: A LOST OPPORTUNITY

NAGPRA's failure to specify a workable form of alternative dispute resolution was not inevitable. In fact, the bill that became NAGPRA outlined a specific form of resolution through mediation. A predecessor to NAGPRA, Senate Bill 187 was presented to Congress in 1986 by Senator John Melcher and contained a mediation process that would have been much more favorable to Native communities than the current NAGPRA legislation.[108] Melcher's Bill created a Native American Museum Advisory Board composed of

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[103] United Nations Educational, Scientific and Cultural Organization [UNESCO], *Final Report of the Subcommittee of Experts on the Draft Rules of Procedure on the Mediation and Conciliation*, UNESCO Doc. CLT-2010/CONF.203/COM.16/1 Rev (July 2010).

[104] The Committee can appoint a mediator if the parties fail to do so within 60 days. *Id.* at Art. 2(5).

[105] *Id.* at Art. 8(3).

[106] *Id.* at Art. 3(2), 10(1).

[107] *Id.* at Art. 10(4).

[108] S. 187, 100th Cong. (1987).

seventeen members, rather than NAGPRA's current seven-member committee, which had the responsibility of resolving repatriation disputes.[109] However, unlike NAGPRA's very general Section 3006(c)(4), Melcher outlined a specific process for dispute resolution.

S. 187 mandates that if a Native American tribe or Native Hawaiian organization encountered a problem while requesting repatriation of a cultural object or skeletal remains, they could file a claim with the Advisory Board.[110] The Advisory Board would then research the claim and, if they found it to be legitimate, would mediate negotiations between the concerned parties.[111] If the mediation was unsuccessful, the Board then had the power to formulate a "compromise settlement."[112] Following a settlement, the Board would also monitor both parties to ensure that the settlement was being acted upon appropriately.[113]

All settlements were to accommodate the interests of the Native tribe in regards to repatriation and reburial or preservation of cultural objects and sacred remains as well as the interests of the museum (or other challenging institution) regarding access to the objects for future study.[114] For example, if repatriation of the cultural object were granted, the Advisory Board would allow museum access to the object provided that the Native tribe approved of the research to be done and that the museum will share with the tribe any information obtained from their research.[115] These types of creative solutions would be possible under NAGPRA if mediation were retained as the mandatory process of resolution.

However, based on feedback from museums and research institutions, Senate Bill 187 was revised in 1988 to establish a Native American Museum Claims Commission consisting of five members that had less power than the Advisory Board to resolve disputes.[116] The Commission encouraged local negotiation of repatriation claims by requiring proof that the tribes attempted to resolve their dispute on their own within 120 days after submitting a claim

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[109] *Id.* at § 4.

[110] *Id.* at § 5(a)(1).

[111] *Id.* at § 5(b)(2).

[112] *Id.* at § 5(c)(1).

[113] If it were determined that either party was not following through with the settlement, they would thereafter be ineligible to receive federal funds for a two-year period (entirely in the case of museums and ineligible to receive federal funds for historic preservation in the case of a Native American group). *Id.* at § 5(d)(1).

[114] *Id.* at § 5(c)(2)(A).

[115] *Id.* at § 5(c)(2)(B)(ii).

[116] The Native American Claims Commission was based off of the former Indian Claims Commission that previously resolved property claims between tribes and other claimants. S. REP. NO. 100-601, at 2 (1988).

to the Commission.[117] If the negotiations failed to resolve the dispute, the Commission would investigate the claims and make a ruling, which could be appealed, but was meant to be the final say on the claim.[118]

In their report on S. 187, the Select Committee on Indian Affairs applauded the Bill for requiring Native American tribes to try to resolve their disputes locally before reaching out to the Claims Commission for advice.[119] However, the revision was not looked upon favorably by the museum community and scientific institutions who wished to keep skeletal remains and cultural objects for research and preservation.[120] These communities thought they were communicating adequately with Native groups and were also greatly opposed to creating a federal regulatory body in the Claims Commission when they much preferred case-by-case mediation.[121] The Native American and Hawaiian groups, however, did not trust individual museums and institutions to properly mediate disputes in an expeditious manner, and so a standoff began that halted the progress of S. 187.[122]

All remnants of Senator Melcher's Bill were taken out of the final NAGPRA legislation, as evidenced by the lack of any mention of mediation in NAGPRA's Sec. 3006(c)(4).[123] This represents quite a loss for American Indian and Hawaiian groups because currently there is no real incentive to

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[117] *Id.* at 6, 10.

[118] S. 187, 100th Cong. §§ 15, 20 (1987).

[119] S. REP. NO. 100-601, at 6 (1988). Interestingly, the Select Committee recommended that museums should have the option to replicate any objects that were repatriated due to their use in ceremonies, allowing the public to benefit from the replica and the tribe to benefit from the original object. *Id.* at 8.

[120] The Department of Justice had several issues with S. 187. They believed that the rights at issue were governed by state, not federal, law and because the Commission was not an Article III court, it did not have the authority to decide state law claims. *Id.* at 13. Additionally, because the President had the power to appoint the Commission members, it was unconstitutional for one of the members to be Native American by statute and for removal of a member to be done by majority vote. *Id.* at 14. The American Law Division of the Congressional Research Service responded to these worries with extensive case law that showed that the concerning provisions of S. 187 were not unconstitutional. *Id.* at 16-27.

[121] Lisa M. Sharamitaro, *Case Study A: Association Involvement Across the Policy Process: The American Association of Museums and the Native American Graves Protection and Repatriation Act*, 31 J. ARTS MGMT. L. & SOC'Y 123, 128-29 (2001).

[122] *Id.* at 129.

[123] It is intriguing to note that this was not an expensive bill. The Congressional Budget Office estimated that the establishment and administrative functions of the Commission would cost approximately $1-3 million per year of federal funds. S. REP. NO. 100-601, at 11 (1988). Therefore, Congress's rejection of specific dispute resolution processes could be seen as a direct response to lobbying by collecting institutions.

avoid litigation and the burden is often on the Native group to seek out and pursue their claims. [124] This burden is clear when it is considered that NAGPRA is not "self-actuating"; the Native American community must take the initiative to get their objects back once they are inventoried by museums and cultural institutions.[125] NAGPRA does acknowledge the legal rights that Native groups have in connection with their sacred remains and cultural objects, which is more than any prior legislation had achieved. However, Native groups that may not have the resources to pursue court actions are still left at a disadvantage.[126]

Even the Melcher Bill, which encouraged local negotiations as well as consideration of oral and historical traditions, did not go far enough to ensure that Native American and Hawaiian rights were taken into account. NAGPRA would be better served if it facilitated a mediation-like process that enabled opposing parties to reach an understanding mutually satisfying enough that enforcement would not be a problem. The solution offered by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation may be useful in this regard. The more formal parts of the mediation process would be honored, therefore making the museum or research institution feel comfortable, while the Native groups would be able to present as much evidence as they wished of the disputed object's importance to their beliefs. This approach propels Native groups to an equal ground with the museums and scientific institutions, therefore making negotiations fair and satisfying to both parties.

In general, it is clear that both Native Hawaiian and Native American groups need to feel that their perspective is being presented and understood by the opposing party. This means that museums and scientific institutions also need to be willing to step out of their comfort zone (for lack of a better term) and openly approach alternative dispute systems. Museums and scientific institutions have an incentive to work with Native groups: open communication between the two sides would serve to be beneficial to both. For example, Native groups could help museums understand and properly

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[124] Though NAGPRA does seek to put the burden of proof on the collecting institution once a repatriation claim has been made, it is often the job of the Native peoples to bring the repatriation issue forward initially. Further, scientific institutions are free to disregard Native evidence if it is not scientifically compelling. Green, *supra* note 2, at 48.

[125] Strickland, *supra* note 43, at 179.

[126] Over the past twelve years, approximately $6.5 million has been granted to tribes and $4.25 million to museums under the purview of NAGPRA to help with repatriation efforts. However, this funding is not guaranteed for the future. Nafziger & Dobkins, *supra* note 20, at 92.

present objects, while museums could help these same groups preserve their culture.

By analyzing each dispute and striving to understand the cultural needs of both parties in order to form a mediation-style dispute process unique to each case, NAGPRA could be much more effective. In fact, because the collecting institutions rejected S. 187 due to a lack of case-by-case mediation, the suggestion that NAGPRA should facilitate individual mediation processes should be well-received. Taking inspiration from Anglo-American mediation techniques as well as Native techniques such as *ho'oponopono* or talking circles, culturally sensitive mediators could create environments conducive not only to resolution, but also to the strengthening of bonds between both sides. Because, though collecting institutions and Native groups are often on opposite sides, they do have many goals in common.

VI. CONCLUSION

The Native American Graves Protection and Repatriation Act is a forward-thinking piece of legislation designed to give a voice to Native groups that have been cheated of their rights to their own cultural objects for hundreds of years. However, because there is no formal alternative dispute resolution mechanism within NAGPRA, most groups find litigation to be the only available method to achieve enforceable results. Therefore, NAGPRA should reach back to its Melcher Bill roots and reintegrate mediation into its dispute resolution process. By inserting mediation back into repatriation claims, Native Americans and Native Hawaiians could utilize a more familiar procedure that would enable them to participate fully in the repatriation process. A flexible form of mediation that changes based on an individual claimant's needs would encourage cooperation from both Native groups and museums and scientific organizations. Mediation would also help to build ties between these two opposing forces that would benefit all. Encouraging consensual dispute resolution in repatriation cases would only help to build America's cultural heritage. Case-by-case mediation is the step that NAGPRA needs to take in order to fully empower the Native groups that want to pursue repatriation claims.